UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL PATRICK RAMSDEN,	)
	)
Petitioner	)
	)
v.	) Civil No. 02-138-B-S
	)
WARDEN, DEPARTMENT OF CORRECTIONS	)
	)
Defendant	)

RECOMMENDED DECISION ON 28 U.S.C. § 2254 PETITION

Michael Ramsden, who was convicted by the State of Maine for elevated aggravated assault, has filed a habeas petition under 28 U.S.C. § 2254 seeking to have his conviction vacated. (Docket No. 1.) The State of Maine has filed a response. (Docket No. 6.) I recommend that the Court **DENY** Ramsden the relief he seeks because I conclude that there is no constitutional infirmity in the State's conviction.

Background

Ramsden is serving a sentence of twenty-four years, with all but nineteen years suspended, for elevated aggravated assault.[1] Ramsden does not contest that on January 22, 1998, he had a confrontation with a man named Armand Knoll at Ramsden's residence in Portland, Maine, and that he stabbed Knoll with a screwdriver in the neck and shoulder area. At his trial Ramsden attempted to prove he did so in self defense. What Ramsden argues in this § 2254 petition is that in advance of his jury trial his attorney delivered unconstitutionally ineffective assistance on two scores. One, on the eve

1 The jury acquitted him on one count of attempted murder.

of jury selection the prosecution offered to recommend a four year sentence in exchange for Ramsden's guilty plea but counsel never informed Ramsden of the offer until after the prosecution withdrew the offer. Two, his counsel did not give him an opportunity to review discovery documents prior to his trial and, therefore, Ramsden had an inadequate opportunity to prepare and participate in his defense.[2]

Ramsden did attempt to get redress from his convictions in the state courts. After trial he filed a motion for a new trial asserting that the state failed to provide defense counsel with a doctor's report that was utilized at trial by a prosecution witness. (This is an infirmity that Ramsden does not raise in this federal petition). Sometime after sentencing,[3] at a non-testimonial hearing, the state presented a written receipt for discovery signed by Ramsden's trial counsel and the judge denied the motion.

Ramsden promptly lodged appeals of the denial of his motion for a new trial and the jury verdict. The appeals were consolidated. Represented by different counsel, Ramsden argued four grounds in his brief to the Law Court. One, that there was insufficient evidence to support the jury's verdict on the elevated aggravated assault count. Two, the trial's court denial of his request for a self-defense instruction was reversible error. Three, the trial judge exceeded his discretion when he permitted the State to go beyond the scope of cross-examination when the prosecution was re-directing a witness. And, four, the trial court committed reversible error when it denied Ramsden's motion for a new trial. (As with the motion for a new trial, these grounds are not reiterated in this federal petition.) The Law Court rejected Ramsden's appeal as being without merit, summarizing all four grounds raised

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2 Ramsden has filled in a third ground in his form 28 U.S.C. § 2254 petition with a caption that indicates that he is asserting that his counsel's ineffectiveness on these two independent scores, when combined, also make his conviction constitutionally infirm. He further faults the Maine courts in the post-trial proceedings for failing to recognize the claims of ineffectiveness. This claim would not be an independent ground for relief if his other claims have no merit.

3 Ramsden lodged an appeal of his sentence and the Law Court denied him leave to pursue this appeal.

and summarily rejecting each.

Ramsden next turned to the state post-conviction review proceedings, asserting, pro se, that his attorney was ineffective in multiple ways. The only grounds relevant to the disposition of his federal habeas are those relating to the two ineffective assistance of counsel claims raised in this § 2254 petition. On his form state post-conviction petition Ramsden charged that his trial counsel deliberately and vindictively refused to inform Ramsden of the plea offer and states that this was a reckless calculation of the risks of proceeding to trial. He also argued that his counsel failed to give Ramsden an opportunity to review discovery materials, including Ramsden's private investigator's report. This is information Ramsden views as having been crucial to his self-defense "strategy."

Ramsden was appointed post-conviction counsel. In an amended post-conviction petition, post-conviction counsel, among other things, faulted trial counsel for his failure to notify Ramsden of the State's four-year capped sentence plea offer: "Because Defendant did not know about the plea offer from the State of Maine, Defendant thought he had no other choice than to go to trial before a jury of his peers. Because of the seriousness of the offense that he was charged with and the amount of time he was facing if found guilty by a jury, if Defendant had known about the offer, he would have taken it." Additionally, this petition faulted trial counsel for failing to allow Ramsden a reasonable opportunity to review discovery material provided by the State and for not giving Ramsden the opportunity to review his own investigator's report. An evidentiary hearing was held.

Post-conviction evidence vis-à-vis counsel's handling of the plea offer

With respect to the plea offer, Ramsden testified that there was no discussion of a plea offer on the Friday before jury selection and trial. (Post Conviction Tr. at 26-27.) He testified that his trial

attorney never spoke with him about the plea offer until they were at the court to pick a jury and he heard that the offer was off the table because they wanted to go to trial. (Id. at 4, 25-26.) At this time his attorney informed him that he had spoken with the trial judge and the judge had told him "it was a good, triable case." (Id.) Ramsden's attorney calculated that the public sentiment was favorable to his self-defense claim because recent self-defense situations in the news had piqued the public; Ramsden's case was "basically a shoe-in" because there were two defenseless women present and Ramsden was within his rights to ask the victim to leave. (Id. at 4-5; see also id. at 10.) Ramsden understood that the offer had been that the State would agree not to ask for more than four years, that his attorney could argue for less, and that usually the judge would go with the State's recommendation, although he confessed that his understanding of these terms came only after he was in prison. (Id. at 24-25.)

Ramsden's trial counsel testified that he did communicate the plea offer to Ramsden on the Friday before jury selections after it was communicated to him by the prosecutor who was handling the case that day. (Id. at 42, 50-51.) To the best of his recollection it was a four-year straight term as opposed to a cap. (Id. at 42-43.) He testified, "I remember going downstairs and talking with him about four years, and I remember the reply was that all he wanted to do was two, that he would be willing to do two years." (Id. at 43.) That Friday the responsible prosecutor said no to two. (Id.) Trial counsel did not recall doing a thoroughgoing analysis of sentence length at this juncture with Ramsden, but the two did discuss that if they went to trial he risked getting more than four, although neither of them thought Ramsden would get the length of sentence he ultimately received. (Id. at 50.) When the offer was made counsel explained to Ramsden that it was a case he could win and it was a case he could lose. (Id. at 51.) He never represented to Ramsden that his defense case was "a slam

dunk winner." (Id. at 51-52.)

Counsel's testimony as to the events relating to the withdrawal of the plea offer the following Monday was:

> Well, apparently what happened over the weekend was ...we had no idea where the victim, Armand Knoll, was, and we had thought that, Mike and I both discussed this, that the word on the street was nobody knew where he was. The police didn't know where he was, and the DA didn't know where he was. We had discussions in chambers with [the trial judge] ... about the fact that the victim was missing or not yet obtained by the state, and I think that ... [the trial judge] said who knows, you know, what a jury would do with no victim, you know. To me that means that's a toss-up type of case. That's what I had told Mike on Friday. At the time on Friday I did not know that there was a new policy being undertaken by the District Attorney's Office that any offer on Friday before [] the calling of the list if not taken on that Friday would be automatically withdrawn on the following Monday. That was a fairly new policy, and unbeknownst to me, so Mike didn't know, Mike had no idea that that offer was going to get withdrawn for Monday morning. He had absolutely no idea, and on Monday morning when we came in, we had found out over the weekend that they did get the victim, they did find the victim, and before we had gone up to chambers Mike and I were downstairs in the dock ... [and learned] they found him, they found the victim, and at that point, at that point I think we started talking about four years it's good, it's better than, if they have got the victim, it's better than going and taking a risk. When we went back up into chambers ... we confirmed it, and we started to say, well, I think he would like to entertain that four-year offer at the time, and we started talking about that in chambers and [the prosecutor] says, no, it's withdrawn, and I said, are you sure? You know you didn't tell me it was going to be withdrawn by Monday morning, and I was surprised, I was shocked and surprised because I just had no idea. I hadn't, I had not advised my client that was a possibility of something occurring, and when I went downstairs I said the offer's been withdrawn, four years is gone, and we got to go to trial because – and the week, on ... Friday they would have wanted him to plead to both the attempted murder and the elevated aggravated, and that was something that he was adamant he never tried to kill the guy. He was just absolutely adamant that he was not guilty of attempted murder, so that was another, that was another issue.

(Id. at 43-45.)

Post-conviction evidence vis-à-vis counsel's handling of discovery materials

With regards to Ramsden's opportunity to review discovery materials, he testified that his trial attorney worked with him on his case for about eight months before his trial (id. at 12) but recalls that he met in person with Ramsden only three times prior to trial (id. at 11). According to Ramsden, he only found out that his court appointed private investigator had completed her report months after the report was done. (Id. at 17.) He tried to call his attorney a couple times collect, but his secretary indicated that counsel was not in. (Id.) Ramsden first received hard copies of his discovery material between two to three weeks after trial; the material constituted two manila envelopes, most of which was stuff that Ramsden concedes he did not understand. (Id. at 7-8.) Ramsden had requested the actual documents frequently during the period in which he was preparing for trial. He felt like he could have used the discovery to do some research about what witnesses would be saying, and attributed his attorney's failure to provide the hard copies to the fact that the attorney was going through personal problems and his secretary was busy. (Id. at 7, 17-18.) At one juncture his attorney visited him at the jail and indicated that he was "proofreading" the materials to assure that the prosecution had turned over all the discovery materials and, at this point, he indicated that he would provide Ramsden with a copy. (Id. at 9, 18.) Ramsden did testify that about a month or so before trial his attorney discussed the contents of discovery with him at the jail and had the actual physical copies with him. (Id. at 18-19.) At this juncture he told Ramsden what people were going to say and how he planned to discredit them. (Id. at 19.)

Ramsden also states that he gave his attorney some suggestions including the employment of

forensic techniques to discredit the victim's version of the location of the encounter as taking place when the victim was standing with his back to Ramsden using a toilet. (Id. at 19-20.) Ramsden version was:

> This thing happened at the front door. I had him at the front door, outside the front door was a ... fold down metal basket with wheels full of bottles... and I was at the front door. There was a kitchen table behind me when the argument ensued he picked that up. I stepped back. I picked up the first thing that was on the table, and we went to war, and that's the way it happened.
> ....
> I had a split second to think, and I might have chosen the wrong thing to do, but it's what I did. It was a split second thing. It wasn't like I am trying to, you know, the way it read is like I try to hack this guy up, take him downstairs and wrap him in a bag, drive him to New Jersey or something. It's didn't happen like that. We got in an argument at the front door. He tried to hit me. I went low. I shout. I stabbed him in the shoulder. I got scared, dragged him down the stairs, then I wanted to just leave. Armand Knoll was fine when I left, or at least I thought he was absolutely fine when I left. I went and got my coat and wanted to get away from the trouble, and that's exactly what I did.

(Id. at 20, 23-24.) Trial counsel and Ramsden discussed strategy and decided that self-defense would be the best approach to defending the prosecution's case. (Id. at 20-23.)

Ramsden was discontent that his attorney did not take his suggestions before and during trial, though he understood that his attorney was there to translate reports into legal evidence. (Id. at 21-22.) In particular, he wanted his attorney to ask of the trial witnesses "specific questions that would trip them up," and bring out the mitigating circumstances. (Id. at 27-29.)

Ramsden's attorney testified that he was lawyer for the day when Ramsden made his initial appearance and he recalls that at this time Ramsden brought up self-defense. (Id. at 35.) He states that he visited Ramsden at the jail more than once. (Id. at 36.) He testified that he "absolutely" went over discovery with Ramsden in preparation for trial:

> I remember bringing it with me[,] talking about it extensively, the ins and outs of it. This was at the time when, when we did go in[to] the investigator, the investigator's reports.
> ...

> I went and visited [Ramsden] to discuss what we had found so far. I didn't have reports from her yet, written reports, but she had given me oral reports, and I talked to him about those reports, what I had found out so far, and also how those didn't match. There were inconsistencies with some of the earlier reports that the witnesses had given the police ... [and] I remember talking to him about that, and later on when the investigation was complete the last thing that [the investigator] did was she told me she went and saw [Ramsden] and discussed with him what she had done. Again she told me she did that, and I assumed that that actually occurred.
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> ...I remember him asking for discovery, whether it was a message from ... my secretary, at the time I don't think he got [written] copies of the discovery to be honest with you.
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> ... I went over it with him in the jail.
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> ...
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> Extensively, yes, we had a long, long meeting. We went over the ins and outs, and basically summarized most of that, if not all of it with him.

Id. at 36-38. During these discussions the two were "on the same page about this being a self-defense case," and they used the investigation to bolster the case. (Id. at 39.) Counsel reports that he drew on Ramsden's suggestions and ideas before and during trial (id. at 39-40) but that he has a "Gestalt" approach to whether to use suggested questions during trial, a decision that depends on overall strategy, witness demeanor, and other theories of the case (id. at 42).

He explained that he has since changed his policy concerning discovery, partly to defend against charges of ineffectiveness such as Ramsden's, so that his records demonstrate that his client has seen the discovery documents. (Id. at 48.) At the time of his representation of Ramsden he did not have a policy on this matter though he did then consider it very important to go over the case with the client (id. at 48-49) and allowed that at the time he may have felt that he could accomplish the same by sitting down with his client and going over it with him (id. at 49). With respect to the assertion that it was an error for him not to provide the discovery documents to Ramsden, counsel summarized:

> In retrospect the important thing is that the defendant knows and has input, knows the nature and detail of the case and has input and is able to assist the attorney in

> the preparation of the defense. Not only did I go and take the materials to Mr. Ramsden to review and discuss ... we had many conversations on the phone with respect to all that evidence, and I accepted collect calls from the jail. I spoke to him many times, and I do believe that he understood the nature of the case against him, and I believe that he assisted me to the best of his ability in preparing for the defense, With respect to strategies[,] now [,] hindsight's always been 20/20.

(Id. at 53.)

The post-conviction decision

In a decision and order dated May 4, 2001, the post-conviction court made the following finding of facts vis-à-vis the two § 2254 claims:

> Petitioner testified that counsel only came to see him one time at the jail prior to trial, that counsel failed to keep him informed of developments ... failed to advise him of a plea offer of 4 years from the State until the morning of jury selection and after the offer had been withdrawn. Petitioner has further alleged that he relied on [trial counsel's] advice that the trial judge told counsel that he had a very strong case of self-defense, [and] that he failed to ask any of the questions he had written out for counsel during the trial... .
>
> ... While awaiting indictment and following arraignment, [trial counsel] had regular telephone contact with Petitioner by collect calls from the jail to his office. He visited Petitioner at the jail and in fact went over in detail all discovery received from the State, although he did not leave copies of the discovery with his client. [Trial counsel] obtained a report from his court–appointed private investigator and discussed the report with his client. His discussion of trial strategy included what portions of the investigator's report he would use or not use and his reasons for that decision. When [trial counsel] appeared at the docket call on Friday before jury selection the following Monday, the State made an offer of 4 years straight time. There was no "cap" agreement on the 4 year offer. This was discussed with Petitioner that day. [Trial counsel] told the prosecutor that his client was willing to do 2 years but not 4 years. The State would agree to no less than 4 years. On the following Monday ... [a] discussion occurred between [trial counsel] and a prosecutor other than the one who had made the plea offer the previous Friday. [Trial counsel] had not been aware of the practice of the District Attorney's office that plea offers not accepted at the Friday docket call were withdrawn. Until Monday morning, the State had been unable to locate the victim, but the State was nevertheless prepared to go to trial with witnesses other than the victim. Ultimately the State did succeed in finding the victim and produced him for trial. The trial judge met with counsel before jury selection, discussed the case, and indicated that he saw it was a triable case in self defense. [Trial counsel]

met with the Petitioner and told him that the State's offer had been withdrawn.

(Post-Conviction Decision & Order at 2-3, emphasis added.) The post-conviction court denied relief, although in its "Conclusions of Law" the court addressed only Ramsden's plea offer ground.

Ramsden filed a motion for leave to appeal the denial of post-conviction relief. In his memorandum Ramsden (perhaps because of the court's failure to address this claim) led by reasserting his claim that his counsel was ineffective because he did not give Ramsden sufficient opportunity to review discovery material. In its order denying a certificate of probable cause to proceed with an appeal of this determination, a Justice of the Law Court concluded that it was apparent that the appeal did not raise any issue worthy of being fully heard. (Order Den. Certificate Probable Cause.)

Discussion

The State concedes two preliminary § 2254 review concerns: this petition is timely under 28 U.S.C. § 2244(d) and Ramsden has adequately aired and exhausted these two § 2254 claims in front of the State post-conviction court as required by § 2254(b) and (c). Indeed, it is beyond question that the factual and legal underpinnings of the two grounds before this court were "tendered" in a manner as to make the federal nature of his claims manifest to the state post-conviction court and, subsequently, the Law Court in the context of Ramsden's attempt to appeal the former decision. See Casella v. Clemons, 207 F.3d 18, 20 (1st Cir. 2000).

Section 2254 relief can be afforded Ramsden only if the state's adjudication of this claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

The First Circuit has recently discussed these review standards in the context of the Sixth Amendment inquiry for ineffective assistance of counsel, relying on the Supreme Court precedents of Strickland v. Washington, 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000):

> To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, [the § 2254 petitioner] must establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984); see also Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir.1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.
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> To prevail on his habeas petition, however, [the § 2254 petitioner] must demonstrate not just that the Strickland standard for ineffective assistance of counsel was met, but also that the [state court's] adjudication of his constitutional claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," Williams v. Taylor, 529 U.S. 362, 405 (2000), or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result," id. at 406. A state court decision involves an "unreasonable application" of clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.
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> The Supreme Court has made clear that "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 410. Therefore, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411, 120 S.Ct. 1495; see also Hurtado v. Tucker, 245 F.3d 7, 15-16 (1st Cir.2001).

Mello v. DiPaulo, 295 F.3d 137, 142 43 (1st Cir. 2002); see also Bell v. Cone, 535 U.S. 685, __, 122 S.Ct. 1843, 1850 (2002) (undertaking the § 2254(d)(1)/ Strickland analysis); Stephens v. Hall, 294 F.3d 210, 217-23 (1st Cir. 2002) (same).

There are three further facets of the § 2254 review worth noting. First, determining the

parameters of "clearly established federal law" in the context of ineffective counsel challenges may not stop at the general Strickland test because there are a myriad of alleged infirmities in a criminal proceeding that are the substantive underpinning of an ineffectiveness of counsel claim. On this score the First Circuit has explained:

> The Strickland principles for deciding ineffective assistance of counsel claims are "clearly established" for purposes of the AEDPA. See Williams, 529 U.S. at 371-74. Because the Supreme Court has yet to adopt more particularized guidelines for ineffectiveness of counsel claims, it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts.

Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002). Second, with respect to the unreasonable application analysis, the First Circuit has clarified that, "[t]he reasoning used by the state court is, of course, pertinent. The ultimate question on habeas, however, is not how well reasoned the state court decision is, but whether the outcome is reasonable." Hurtado v. Tucker, 245 F.3d 7, 20 (1st Cir. 2001) (citations omitted). Third, with regards to the state courts' factual determination, Congress has provided that "a determination of a factual issue made by a State court shall be presumed to be correct" and that § 2254 applicants "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

There is one further twist with respect to setting forth the parameters of this court's review of the state court judgment. Because the post-conviction court made no "Conclusions of Law" with respect to Ramsden's claim that his attorney was ineffective in failing to share discovery with him, I must address the legal parameters of the claim under the less deferential de novo standard. Fortini v. Murphy, 257 F.3d 39, 47 (1st Cir. 2001) ("After all, AEDPA imposes a requirement of deference to state court decisions, but we can hardly defer to the state court on an issue that the state court did not

address."). This does not mean, however, that I do not heed the factual findings made by the court vis-à-vis the discovery ground with the deference afforded by § 2254(e)(1).

Disposition of the plea offer claim

With respect its "Conclusions of Law" the court addressed only Ramsden's plea offer ground. First it summarized the standard for the right of effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Maine Constitution by drawing on Law Court precedent articulating the performance/prejudice standard.

In reaching this conclusion the post-conviction court relied on a string of Maine Law Court cases in articulating its standard. However, the standard Maine courts apply is to be read as being equivalent to the Strickland ineffective assistance of counsel analysis. Kimball v. State, 490 A.2d 653, 656 (Me.1985); accord Brewer v. Hagemann, 2001 ME. 27, ¶9, 771 A.2d 1030, 1033; see also Mello, 295 F.3d at 144 (observing that the Strickland and Massachusetts standards are the "functional equivalent" for purposes of proceeding with the § 2254(d)(1) determination).

Next the post-conviction court provided:

> The ultimate decision of whether to accept a plea agreement from the prosecution must be made by the defendant. [Trial counsel] discussed the 4 year offer with the Petitioner and responded to the prosecutor that Petitioner would accept 2 years incarceration. The Petitioner's prior criminal history and his knowledge of the criminal justice system made him well aware of the risk of going to trial and the sentence that could be imposed upon conviction.
>
> Considering the evidence presented, the court finds that the Petitioner has not carried his burden of proving that the performance of [trial counsel] fell bellow that of an ordinary, fallible attorney.
>
> For all foregoing reasons, the entry shall be[:] The Petition is DENIED.

(Id. at 4.)

Although the Maine post-conviction court did not flesh-out a general outline of an attorney's responsibility with respect to conveying and discussing plea offers with clients, serious deficiencies in this respect can be the basis of an ineffectiveness claim. "A defendant has a right to be informed by his counsel of a plea offer," the First Circuit has observed, providing that "[o]rdinarily, counsel's failure to do so constitutes ineffective assistance of counsel." United States v. Rodriguez Rodriguez, 929 F.2d 747, 752 (1st Cir. 1991) (citing Johnson v. Duckworth, 793 F.2d 898, 901 (7th Cir.)); see also Purdy v. United States, 208 F.3d 41, 44-45 (2d Cir. 2000).[4]

The state court made a finding of fact that Ramsden's trial counsel informed Ramsden of the plea offer, discussed it with him, and relayed Ramsden's counter-offer of two years. It relied on these factual findings in concluding that his counsel's conduct did not fall short of the performance threshold of constitutionally adequate representation. This determination was not contrary to Supreme Court precedent as the state court was not confronted with a set of facts "materially indistinguishable" from a Supreme Court decision. Williams, 529 U.S. at 405. Giving the court's factual findings their presumption of correctness under § 2254(e), I also conclude that this was not an unreasonable application of Strickland, for, based on the factual finding that the plea offer was communicated to and discussed with Ramsden on Friday, this was not an erroneous or incorrect application of Strickland, let alone one that was "unreasonable." Williams, 529 U.S. at 411.

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4 The Purdy panel noted:

> Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness because "[r]epresentation is an art," Strickland, 466 U.S. at 693, and '[t]here are countless ways to provide effective assistance in any given case," id. at 689. Counsel rendering advice in this critical area may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea (whether or not accompanied by an agreement with the government), whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision.

Additionally, having read the transcripts of the hearing, summarized above, and again deferring under § 2254(e), the court did not make "an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." § 2254(d)(2); see cf. United States v. Butt, 731 F.2d 75, 80 n.5 (1st Cir. 1984)(collecting cases) ("Evidentiary hearings have been granted to § 2255 appellants who have claimed that their plea was induced by attorney misrepresentations only when the allegations are highly specific and usually accompanied by some independent corroboration."). Ramsden's trial attorney offered specific details of his plea discussion with Ramsden, including the two-year counter offer and its rejection, and the post-conviction court credited the testimony of Ramsden's attorney over Ramsden outright deinal.

Disposition of the access to discovery claim

As noted above, in contrast to the plea offer claim, my review of Ramsden's claim that his attorney was ineffective in not giving him access to his discovery materials (thereby interfering with Ramsden's ability to further his case) requires me to proceed on a clean slate as there is no legal determination to examine. See Fortini, 257 F.3d at 47. However, I defer to the pertinent findings of fact by the post-conviction court.

I could find no case that stood for the proposition that, in order to deliver constitutionally adequate representation, an attorney must provide his client in every case with hard copies of the discovery documents and investigative reports. At least one court recognized a similar void when addressing this question. Carillo v. United States, 995 F.Supp. 587, 591 (D.C. Virgin Is. 1998) ("[T]here is no constitutional duty to share discovery documents with petitioner. Petitioner cites no case

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Id. at 44-45.

law for this proposition, and this court finds none."). While it "is undisputed that a defendant has a constitutional right to participate in the making of certain decisions which are fundamental to his defense," Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir.1986) (observing that the decision to proceed without counsel, waive a jury trial, and plead guilty are among these "fundamental choices"), the actual access to the hard copies of the discovery documents was not in this case fundamental to Ramsden's defense.

The post-conviction court found that while awaiting indictment and following arraignment, Ramsden had regular telephone contact with his trial attorney by collect calls from the jail to his office. His attorney visited Ramsden at the jail and in fact went over, in detail, all discovery received from the State, but he did not give copies of the discovery to his client. His attorney obtained a report from his court –appointed private investigator and discussed the report with his client. His discussion of trial strategy included what portions of the investigator's report he would use or not use and his reasons for that decision. I also note that the evidence before the court included Ramsden's concession that he did not understand much of the information contained in the documents when he received the two envelopes after trial and that Ramsden and his attorney did agree on the overriding "strategy" of self-defense. In view of this evidence, there simply was no constitutional deficiency in counsel's performance in this area as his approach did not fall below the objective standard of reasonableness. See Strickland, 466 U.S. at 694.

Conclusion

For these reasons I recommend that the Court **DENY** Ramsden relief under 28 U.S.C. § 2254.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

February 14, 2003.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

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V.

Defendant

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